No. 76-716

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1976

FRED FISHER,

Petitioner,

v.

THE FIRST NATIONAL BANK OF CHICAGO,

Respondent.

On Petition for a Writ of Certiorari
To the United States Court of Appeals
for the Seventh Circuit

BRIEF FOR RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

The petition presents the two following questions:*

1. Does Section 85 of the National Bank Act, which expressly provides that a national bank may charge the rate of interest allowed by the state in which it is located, permit a national bank located in Chicago, Illinois, to make loans to Iowa residents at the rate of interest allowed by the laws of the state of Illinois?

* As explained at pp. 9-10, *infra*, a grant of the writ may also entail consideration of a jurisdictional question that petitioner has failed to identify adequately.

2. Should the Court accept petitioner's implicit invitation to overturn *Tiffany* v. *National Bank of Missouri,* 85 U.S. 409 (1873), where it held (a) that a national bank may charge the highest rate of interest allowed on a specified class of loans by the state in which the bank is located and (b) that a national bank is not limited to the maximum rate of interest allowed state banks when other lenders are allowed a higher rate?

STATEMENT OF THE CASE

In June, 1969, petitioner, Fred Fisher, a resident of Iowa, received a credit card issued by respondent, The First National Bank of Chicago, a national banking association located in Chicago, Illinois. Fisher accepted the card and used it numerous times to obtain credit from the Bank pursuant to the terms of the agreement that was enclosed with the card when he received it. Among other things, the cardholder agreement provided:

> "10. This Agreement is made in Illinois and the validity, construction and enforcement of this Agreement and all matters arising out of the issuance and use of FirstCard shall be governed by the law of Illinois."

Fisher used his card to obtain credit in the total amount of $530.63 and accumulated finance charges of $97.30 (at the disclosed rate of 1½% per month of the unpaid principal balance) during the eighteen months that his account was active. Also during that time, the Bank mailed Fisher monthly statements from Chicago, and Fisher made sporadic payments to the Bank in Chicago, totaling $221.81, of which $91.39 was applied to interest.

As of January 3, 1971, Fisher's account showed an unpaid balance of $406.12, of which $400.21 represented principal. Thereafter, without any prior notice or complaint to the

Bank, Fisher failed to make any further payment on his outstanding balance.

This action followed and was originally filed by Fisher in the United States District Court for the Southern District of Iowa. After the Bank's challenge to subject matter jurisdiction was denied by a divided United States Court of Appeals for the Eighth Circuit, sitting en banc,* the case was transferred to the Northern District of Illinois pursuant to the national bank venue statute, 12 U.S.C. § 94. Subsequently, on June 13, 1975, the district court dismissed the complaint for failure to state a claim upon which relief could be granted. (App. B). The judgment was affirmed on appeal, 538 F.2d 1284 (7th Cir. 1976) (App. A), and on August 31, 1976, Fisher's petition for rehearing was denied.

REASONS FOR DENYING THE PETITION

I. THE DECISION BELOW IS A STRAIGHTFORWARD INTERPRETATION OF SECTION 85 OF THE NATIONAL BANK ACT, CONSISTENT WITH NUMEROUS OTHER INTERPRETATIONS OF SIMILAR LANGUAGE ELSEWHERE IN THE ACT, AND IS NOT AN APPROPRIATE DECISION FOR THIS COURT TO REVIEW.

This case turns on the meaning of Section 85 of the National Bank Act, which provides that a national bank may charge "on *any* loan . . . interest at the *rate allowed by the laws of the State, Territory or District where the bank is located.* . . ." 12 U.S.C. § 85. (Emphasis supplied.) On the basis of this unambiguous statutory language, the court of appeals held that the Bank, indisputably located in Illinois, could charge the interest rate allowed by the laws of Illinois

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* *Sub nom Burns* v. *American Nat'l Bank & Trust Co.,* 479 F.2d 26 (8th Cir. 1973) (App. C). Certiorari was not sought by the Bank. (Unless otherwise indicated, the appendices referred to herein are those appended to the petition.)

on a specified class of loans, even though the borrower was an Iowa resident.

There has never been any dispute in the lower courts that Section 85 is the governing statute or that the Bank's interest rate is lawful under the Illinois Revolving Credit Act, Ill. Rev. Stat. ch. 74, § 4.2. The only controversy has been the meaning of the phrase "State . . . where the bank is located." Fisher has urged that the Bank is "located" wherever its customers happened to reside, an argument understandably rejected below:

> "[T]here can certainly be no lingering doubt as to the meaning of 'where the bank is located'. . . . The defendant here is located, established and organized in only Chicago, Illinois, and is subject therefore to the rate of interest 'allowed by the laws of the State' of Illinois." 538 F.2d at 1289.

In reaching this conclusion, the court relied in part on the recent decision in *Radzanower* v. *Touche, Ross & Co.*, 48 L.Ed.2d 540 (1976), where, in intepreting 12 U.S.C. § 94, this Court noted that:

> "Federal courts have consistently ruled that the place specified in a bank's charter as its home office is determinative of the district in which the bank is 'established'. . . ." *Id.* at 545 n.2.*

The court below also explained that there has never been any suggestion that "Congress gave one meaning to 'locate' in § 94 and another meaning to the same word in § 85." 538 F.2d at 1289. Moreover, the term "located" has been similarly construed wherever it appears in the National Bank Act or in other statutes concerning national banks. *See National City Bank* v. *Domenech,* 71 F.2d 13, 16 (1st Cir. 1934), *aff'd,* 294 U.S. 199 (1935) (concerning taxation of national banks, 12 U.S.C. § 548); *American Security Co.* v. *Bank of California,* 133 F.2d 160, 161-62 (9th Cir. 1943) (concerning federal jurisdiction over national banks under Section 41(16) of the Judicial Code, now 28 U.S.C. § 1348).

Fisher wrongly cites *Meadow Brook Nat'l Bank* v. *Recile;* 302 F.Supp. 62 (E.D. La. 1969), as supporting a contrary interpretation. That case involved a loan made by a national bank located in New York to a Louisiana company. The court's analysis of Section 85 was entirely consistent with the decision below, as the court explained:

> "The plaintiff bank is located in the State of New York. Thus, if § 85 is applicable to this case, we must refer to New York law to determine the maximum interest rate.
>
> • • •
>
> "[I]f 12 U.S.C. § 85 is applicable, it leaves no room for the operation of the laws of this state [Louisiana] as to the interest rate." *Id.* at 72, 73.

However, for unexplained reasons, the court went on to hold that the National Bank Act does not apply at all to loans made by a national bank to residents of other states. The court thereupon applied both the Louisiana interest law and its remedies, but subsequently vacated its decision and ordered a new trial. (A copy of the unpublished order granting the new trial is appended hereto.)

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* This Court cited as examples: *Buffum* v. *Chase Nat'l Bank,* 192 F.2d 58, 60 (7th Cir. 1951), *cert. denied,* 342 U.S. 944 (1952), and *Leonardi* v. *Chase Nat'l Bank,* 81 F.2d 19, 22 (2d Cir.), *cert. denied,* 298 U.S. 677 (1936). Similar decisions include *United States Nat'l Bank* v. *Hill,* 434 F.2d 1019, 1020 (9th Cir. 1970); *First Nat'l Bank* v. *United States District Court,* 468 F.2d 180, 182-83 (9th Cir. 1972); *Helco, Inc.* v. *First Nat'l City Bank,* 470 F.2d 883, 884 (3d Cir. 1972); *Bank of America* v. *Whitney Central Nat'l Bank,* 261 U.S. 171, 172-73 (1923); and *Klein* v. *Bower,* 421 F.2d 338, 342 (2d Cir. 1970).

In this case, Fisher has never urged that Section 85 is inapplicable and indeed sued under Sections 85 and 86. Thus, the only aspect of *Recile* that has any bearing on the issues in this case is the court's analysis of Section 85. Since that analysis is contrary to Fisher's position and is consistent with the decision below, it demonstrates that there is no conflict among the lower federal courts for this Court to resolve.

At bottom, Fisher is asking this Court to engage in judicial legislation. This is precisely what the court below declined to do when it stated that it would not "twist the plain meaning of the statute." 538 F.2d at 1290. That result is completely in accord with the proper role of the judiciary in interpreting congressional enactments, as exemplified by this Court's own decision in *Radzanower.*•

II. THERE ARE OTHER GROUNDS SUPPORTING THE DECISION BELOW, WHICH FURTHER MILITATE AGAINST A GRANT OF THE WRIT.

The decision below made it unnecessary for the court to consider the law of Iowa in detail. It is clear, however, that ascertaining the rate of interest *allowed* by a state requires more than reading its banking statutes; it is necessary to review other state law, common as well as statutory, including relevant choice of law principles. *See First Nat'l Bank* v. *Nowlin,* 509 F.2d 872, 876 (8th Cir. 1975). In this case, Iowa would have adopted Illinois' Revolving Credit

• The recent decision of a state court judge in *Iowa ex rel. Turner* v. *First of Omaha Service Corp.,* Equity No. CE 3-1300 (Polk Cty. Dist. Ct. 1976), is an example of such judicial law-making. The most noteworthy aspect of the opinion (petitioner's Appendix E) is that it nowhere even discusses the language of Section 85; hence, it is of no precedential interest here. Moreover, on September 7, 1976, the Polk County, Iowa, District Court vacated its September 3, 1976, order and granted a new trial in order to reconsider its prior ruling.

Act under its law recognizing both the principle of contractual agreement specifying the law to govern, *Butters* v. *Olds,* 11 Iowa 1 (1860); *Arnold* v. *Potter,* 22 Iowa 194, 199-201 (1867); Iowa Code Anno. § 554.1105 (Uniform Commercial Code choice of laws provision), and the doctrine of validation, which upholds an interest rate for an interstate loan if the rate is allowed by either of the states involved. *Bigelow* v. *Burnham,* 83 Iowa 120, 49 N.W. 104 (1891).

These principles have long been recognized in the federal courts. In *Seeman* v. *Philadelphia Warehouse Co.,* 274 U.S. 403, 407 (1927), the Court stated:

> "Respondent, a Pennsylvania corporation having its place of business in Philadelphia, could legitimately lend funds outside the state and stipulate for repayment in Pennsylvania in accordance with its laws and at the rate of interest there lawful, even though the agreement for the loan were entered into in another state where a different law and a different rate of interest prevailed."

See also Consolidated Jewelers, Inc. v. *Standard Fin. Co.,* 325 F.2d 31, 33-34 (6th Cir. 1963); *Fahs* v. *Martin,* 224 F.2d 387, 397 (5th Cir. 1955); *Blackford* v. *Commercial Credit Corp.,* 263 F.2d 97, 113 (5th Cir.), *cert. denied,* 361 U.S. 825 (1959); Restatement (Second) of Conflict of Laws § 203, Comment *b* (1971).

Although Fisher has simply ignored these principles, any review of the decision below would inevitably require this Court to determine whether long-established choice of law principles in Iowa should be reversed. Moreover, such a determination would apply to this case, and this case only, because four years after the transactions that are the subject of this case Iowa modified its choice of law principles through legislation. Code of Iowa Anno. §§ 537.1201(6)(a) (Uniform Consumer Credit Code).

Furthermore, even under Iowa's interest statutes the judgment below would be sustained. Fisher's argument has always been premised on the notion that the Bank could only charge the maximum interest rate that Iowa state banks may charge. But for more than a century, Section 85 has been understood to mean that national banks may charge the highest rate of interest allowed *any* lender in the state on the same specified class of loan. *Tiffany* v. *National Bank of Missouri*, 85 U.S. 409 (1873). In *Tiffany*, the Court expressly held that the National Bank Act "does *not* declare that the rate limited to State *banks* shall be the maximum rate allowed to National banks." *Id.* at 412. (Emphasis supplied.) This Court has never departed from that holding, which has been applied through the years and which permits national banks to charge the same interest rates as savings and loan associations and small loan companies, *E.g.*, *First Nat'l Bank* v. *Nowlin, supra; Northway Lanes* v. *Hackley Union Nat'l Bank & Trust Co.*, 464 F.2d 855, 861-64 (6th Cir. 1972); *Partain* v. *First Nat'l Bank*, 336 F. Supp. 65, 66-67 (M.D. Ala. 1971), *rev'd on other grounds*, 467 F.2d 167 (5th Cir. 1972); *Commissioner* v. *First Nat'l Bank*, 300 A.2d 685, 687-90 (Md. Ct.App. 1973).

In fact, *Tiffany* has been expressed in a regulation promulgated by the Comptroller for the Currency, 12 C.F.R. § 7.7310, and has been reiterated in more than eighty rulings by the Comptroller since 1933. *Commission* v. *First Nat'l Bank*, 300 A.2d 685, 690-91 (Md. Ct. App. 1973). During this time, Congress has not seen fit to amend Section 85 despite numerous other amendments to the National Bank Act, a point of no little significance. *See Radzanower* v. *Touche, Ross & Co.*, 48 L.Ed.2d at 549 n.16.

Fisher has never argued that the Bank's rate of interest was not consistent with the rate provided by the Iowa Small Loan Act, urging instead that *Tiffany* and

its progeny should be discarded. His premise is that the National Bank Act requires absolute "competitive equality" between national and state banks, and for that proposition he relies on branch banking cases under the McFadden Act, 12 U.S.C. § 36, which embodies principles and policies of its own and which in no way addresses or undermines the *Tiffany* doctrine.* The absence of any judicial or legislative support for petitioner's position for more than one hundred years strongly militates against granting the writ.

Finally, this Court should not take up the questions pressed by Fisher because federal jurisdiction in this case is doubtful. The Court of Appeals for the Eighth Circuit held that jurisdiction rested on 28 U.S.C. § 1337 (commerce jurisdiction), which does not require that a jurisdictional amount be satisfied. 479 F.2d 26 (1973). (App.C). Although this view has been adopted by several circuits, *Cupo* v. *Community Nat'l Bank & Trust Co.*, 438 F.2d 108 (2d Cir. 1971); *Partain* v. *First Nat'l Bank*, 467 F.2d 167 (5th Cir. 1972), another analysis suggests that § 1337 was not intended to create federal jurisdiction over any case involving a national bank simply because of the status of the bank. Rather, 28 U.S.C. § 1348 demonstrates that a national bank was to be treated as an ordinary corporation for jurisdictional purposes. *Leather Mfrs.' Bank* v. *Cooper*, 120 U.S. 778, 781 (1887); *Petri* v. *Commercial Nat'l Bank*, 142 U.S. 644, 651 (1892); *Ex parte Jones*, 164 U.S. 691, 693 (1897). Thus, jurisdiction in a usury case should require satisfaction of the jurisdictional amount either for diversity

* It is difficult to perceive how an Iowa bank would be at a *competitive* disadvantage if it charged a lesser interest rate: principles of economics dictate that the Iowa bank would get the business. Moreover, the "equality" proposed by the McFadden Act is one between national banks and state banks in the *same* state in which the national banks are located. Fisher is hardly suggesting that the equality principle means that respondent is entitled to the same branching privileges in Iowa as are allowed Iowa state banks.

jurisdiction, 28 U.S.C. § 1332, or for federal question jurisdiction, 28 U.S.C. § 1331. The presence of this threshold question strongly suggests that the issues sought to be reviewed by petitioner should await a better jurisdictional and factual record before the Court determines whether the statutory issues are worthy of review.

CONCLUSION

For the reasons stated above, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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December 22, 1976

APPENDIX

Minute Entry
November 24, 1969
Heebe, J.

THE MEADOW BROOK NATIONAL BANK

versus

SAM J. RECILE and
WILSON P. ABRAHAM

CIVIL ACTION

No. 67-341

Section B

This cause came on for hearing on a previous day on the motion of the Meadow Brook National Bank for a new trial and amendment of judgment or, in the alternative, to correct a clerical mistake in the judgment, and the motion of defendant, Wilson P. Abraham, for amendment of judgment. The Court, having studied the legal memoranda submitted, having heard the arguments of counsel, and having considered all of the evidence, is now fully advised in the premises and ready to rule.

IT IS THE ORDER OF THE COURT that the motion of the Meadow Brook National Bank for a new trial, be, and the same is hereby, GRANTED.

Frederick J. R. Heebe

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